



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2004

Mr. Lou Bright
General Counsel
Texas Alcoholic Beverage Commission
P. O. Box 13127
Austin, Texas 78711-3127

OR2004-10574

Dear Mr. Bright:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 215155.

The Texas Alcoholic Beverage Commission (the "commission") received a request for nineteen items of information related to "Dawgs on Hawgs," an event in 2004, and permitting. You state that some responsive information has been released to the requestor. You indicate that the commission has no information responsive to items 8, 10, 11, 18, and 19 of the request.¹ You claim that the remaining requested information is protected under Texas Rule of Civil Procedure 192.5 and is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We begin by noting that some of the submitted documents in Exhibit C are not responsive to the instant request for information, as they were created after the date that the commission received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the commission need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information that other statutes make confidential. Section 5.48 of the Alcoholic Beverage Code provides as follows:

(a) “Private records,” as used in this section, means all records of a permittee, licensee, or other person other than the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license, or in a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.

(b) The private records of a permittee, licensee, or other person that are required or obtained by the commission or its agents, in connection with an investigation or otherwise, are privileged unless introduced in evidence in a hearing before the commission or before a court in this state or the United States.

We note that the term “privileged” in section 5.48 has been construed to mean “confidential” for purposes of the Act. *See Attorney General Opinion JM-1235 at 2 (1990); see also Open Records Decision Nos. 186 (1978), 62 (1974).* Thus, section 5.48 makes privileged any records required or obtained by the commission, with the exception of “the name, proposed location, and type of permit or license sought in any application for a permit or license or any renewal thereof” and “any periodic report covering the importation, distribution, or sale of any alcoholic beverages required by the [Texas Liquor Control] Board to be regularly filed by a permittee or licensee.” Alco. Bev. Code § 5.48.

You indicate that the information submitted in Exhibit D pertains to a business entity’s applications for a temporary permit to serve alcoholic beverages and that the requestor has been provided with the applicant’s name, proposed location, and the type of permit for which the applicant applied. You do not inform us that the information at issue has ever been introduced into evidence in a hearing before the commission or before a court in this state or the United States. Based on your representations and our review of the submitted information in Exhibit D, we agree that this information consists of “private records” that are privileged under section 5.48 of the Alcoholic Beverage Code. Therefore, the submitted

information in Exhibit D must be withheld from release pursuant to section 552.101 of the Government Code.

You next claim that rule 192.5 of the Texas Rules of Civil Procedure is “other law” that, in accordance with *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), protects the responsive information submitted in Exhibit C from disclosure by the attorney work product privilege. The information at issue is not subject to section 552.022 of the Government Code. Consequently, we address your attorney work product argument under section 552.111 of the Government Code, which excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A

document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You inform us that Exhibit D was prepared by agents of the commission for the purpose of instituting civil litigation. You state that this information will form the basis of administrative charges that will be presented to the State Office of Administrative Hearings by attorneys for the commission. You also inform us that the agents of the commission who prepared the submitted information were acting as representatives of attorneys for the commission who are responsible for conducting administrative litigation. You state that when the information was prepared, there was a substantial chance that litigation would ensue, and the information was prepared in the belief that litigation would ensue. You assert that the submitted information contains the investigators' mental impressions, conclusions, and opinions. You also inform us that access to the submitted information has been confined to those employees of the commission necessary to prepare for litigation of the matter to which the information pertains. Having considered your arguments, we conclude that you have demonstrated that the information submitted as Exhibit C is excepted from disclosure under section 552.111 of the Government Code, and it may be withheld on that basis.

In summary, (1) the submitted information in Exhibit D must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code, and (2) the information submitted as Exhibit C may be withheld from disclosure under section 552.111 of the Government Code. As our ruling is dispositive, we do not address your remaining claims.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

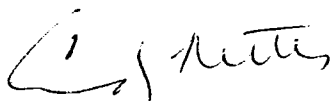
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 215155

Enc. Submitted documents

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(w/o enclosures)